No. 10-490

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF UTAH,

Petitioner,

vs.

MARK ANTHONY OTT,

Respondent.

On Petition for Writ of Certiorari
to the Utah Supreme Court

BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

The Crimes

Mark Ott cut the phone lines and broke into his own home looking for Allen Lawrence, who had been in Ott's bed with Ott's wife, Donna, after the Otts had made a commitment to reconcile in their difficult marriage (R1374: 80; R. 1375: 18, 85; Defense Exhibit 8 p. 35). When Ott entered the bedroom, Allen Lawrence tried to shut the door on and grabbed Ott, who stabbed Lawrence twenty-three times in about twenty seconds, causing severe life-threatening injuries (R1375: 95-97, 117; R. 1381:112, 161). In the course of Ott's frenzied knife attack on Allen Lawrence, Ott also stabbed Ott's stepdaughter, Sarah, who tried to intervene, although she later recognized he may not have intended to stab her (R. 1381: 192). Ott continued stabbing Allen Lawrence until the knife broke off in Lawrence's back, at which point Sarah helped Lawrence flee Ott's home (R1374: 86, 89; R. 1375: 119, 146). Ott, who had cut his own neck, trailed his own blood to the garage before dousing gasoline inside the house and setting it on fire (R. 1381: 141, R1375: 23, 25, 147). Donna retrieved her daughter, Lucy, and Lucy's friend from the basement, directing them to flee to the neighbor's and call the police, before Donna also fled (R. 1375: 57). Ott made no effort to stop anyone from leaving the home, and fled the scene in Donna's Explorer (R1375:28-29).

Allen Lawrence's six-year-old daughter, Lacey, who had been sleeping in the Otts' youngest daughter's bedroom, died of carbon monoxide poisoning from the fire (R1376: 114-115). Mark Ott did not know Lacey Lawrence was in his home when

he set it on fire (R1378:134-35). Her death was an accident (R1381: 11).[1]

Proceedings in the Trial Court

Prior to trial in what was then a death penalty case, the prosecution notified the defense of its intent to introduce the "Meet Lacey Lawrence" videotape in the penalty phase of the trial (R. 1141).[2] The prosecution also gave pretrial notice of its intent to call Lacey's mother as a witness. Lacey's mother was not involved in the crimes (e.g. R. 1141).

Despite having received notice that the State intended to present highly prejudicial victim impact evidence concerning Lacey Lawrence, and despite the fact that Ott did not know Lacey was present and had no intention of killing her when

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[1]The State conceded from the outset of the case that Ott did not know that Lacey Lawrence was in his home (R1381: 11). In the recording of Ott's first extradition hearing in Idaho, he can be heard crying when the judge told him someone died in the fire. In the recording of the second extradition hearing, he can be heard sobbing when the judge told him a six-year-old child had died in the fire. From the comments made by the judge and the judge's tone of voice, it appears that Ott was not tracking mentally during the hearings (R. 1377: 6-7). Ott repeatedly tried to commit suicide in Idaho before his extradition, and in the Utah facilities where he was held prior to trial (R1377:153-61; Defense Exhibit 8 p. 49).

[2]"Meet Lacey Lawrence" is a powerfully moving six minute movie of Lacey and her loved ones sharing the milestones in Lacey's life. It begins with her as a baby being held, fed and bathed by her family members, crawling, rolling over, and walking. It shows her as a small child attending parties, celebrating Christmas, singing "Happy Birthday," blowing out candles, eating birthday cake, smiling, playing, riding a horse with her father, and dancing. It also depicts what appears to be her artwork, including her drawing of a little girl in bed, and her writing of, "I love you Mommy" amidst raindrops or teardrops. It ends with the dates of her birth and death, showing that she died two weeks before her seventh birthday (R1376:172). It is set to "You'll Always Be a Part of Me," sung by Billy Joel and "It's a Wonderful World," sung by Louis Armstrong.

he set the fire, his attorneys did not file a motion in limine to prevent the jurors who would decide his fate of life or death from hearing improper victim impact evidence.

After jury selection began, Ott entered an Alford plea to capital murder, and pled guilty to attempted aggravated murder, aggravated arson, and aggravated assault (R1121-1133, 1135). The prosecution agreed to remove the death penalty as a sentencing option and dismissed other charges (R. 1135).

In the penalty phase trial wherein the jurors were to determine if Ott would serve life with or without parole, the State presented the testimony of Lacey's family members and friends characterizing Ott and his crimes, and asking the jurors to impose the maximum sentence of life without parole.[3] The State also presented the "Meet Lacey Lawrence" recording and other highly prejudicial evidence concerning the pain Lacey's family members and friends suffered as a

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[3]See Pet. App. at 17-18 (Allen Lawrence characterized Ott as a psychopathic terrorist who deals with anarchist cookbooks, who had no empathy for others, respect for their rights or feelings or pursuit of happiness, who would not have taken Lacey out of his house had she known she was there and thought no more of killing others than picking an apple off a tree); Pet. App. at 18-19 (Donna Ott predicted that if Ott were paroled in twenty years, she would expect him to come looking for them and repeat his crimes because he was a control freak who lives his life by threatening others to get what he wants); Pet. App. at 19-20 (Sarah Gooch predicted that Ott would not change, and if paroled would likely be more angry from the time spent in prison); Pet. App. at 20 (Lucy Gooch predicted that if Ott were paroled at any age, he would come out and finish the crimes he started); Pet. App. at 20-22 (Amber Lawrence opined that Ott should not be alive or have any rights, and did not care who he killed), and Pet. App. at 22 (Terry Cook testified that she hoped Ott would not be paroled, but would spend the remainder of his life thinking about her life-long pain).

result of her death.[4]

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[4]Lacey's mother, Terry Cook, had no ostensible prior dealings with Ott and was not involved in the crimes. She told the jurors of her five miscarriages which preceded her high risk pregnancy with Lacey, her only child. She told them the painful details of how she learned of Lacey's death on the morning that they were supposed to go choose a new kitten together (R1376: 162-67). She told them her life was destroyed; she could not sleep or work or go to school or socialize or have relationships, and had just started medication because counseling did not help (R1376:167-69). She also conveyed the pain felt by her parents and friends (R1376:170-71).

Lacey's step-sister, Amber Lawrence, sixteen years old at the time of the crimes, testified that Lacey was her only little sister, whom she had always wanted (R1376: 154, 158). Amber used to be an honor student, but had dropped out of school since Lacey's death and was trying to graduate in night school, but could not concentrate and had begun to stutter (R1376:157). She told the jurors that she was supposed to have been there at Ott's home on the night her little sister died (R1376:154). This was particularly disturbing testimony, given that their father had lain outside the home, too badly injured by Ott to go into the home and rescue Lacey, whose presence in the house was forgotten by others until it was too late (R1375:121-22; R1375:29-30).

Lacey's father, Allen Lawrence, was acquainted with Ott, as he had had two threatening confrontations with Ott when Ott found him with Ott's wife prior to the night in question (R1374: 237-38, 24-43, 148-55, 1375:105, R. 1381: 153). He testified that he knew his daughter was in the burning house but could not see or get up, and could not talk because he was gurgling with blood (R1375:121). He heard Donna scream that Lacey was in the house, and it was horrible for him not to be able to move to save his daughter and to just lie there trying to hold himself together and hoping someone could save her (R1375:120-22). He later overheard one med tech ask if they got the little girl out, and the other one answered no (R1375:123). That was the last thing he recalled hearing for a few days (R1375:123). He was in a morphine nightmare with the knowledge that he had been cut to ribbons and that his daughter was dead (R1375:123).

He told the jurors that for about a year after her death, he wished he was dead and would trade places with Lacey in a heartbeat (R1375:124-25). He talked of everyone's sadness, and detailed how his other daughter, Amber, had a nervous breakdown and was shock for months (R1375:125). Amber was a junior in high school at the time and never went back to school because of the stigmatizing effect of the crimes (R1375:125). He testified about how wonderful Lacey was and how much he loved being her father (R1375:128-31).

Donna Ott testified about the trauma she and her children suffered from Ott's crimes (R1375: 31-34). She testified that Lacey took care of Ott's daughter,

The requisite ten of twelve jurors entered the verdict of life without parole (R. 1189).

The Direct Appeal and Temporary Remand

On direct appeal in the Utah Supreme Court, and in the trial court during a temporary remand for inquiry into Ott's claims of ineffective assistance of counsel pursuant to Utah Rule of Appellate Procedure 23B, Ott argued that his lead appointed trial counsel harbored an actual conflict of interest.[5] He also argued that

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Carissa, who was three, and they were like sisters, and that Ott's son, William, was in love with Lacey (R1375:7).

Sarah Gooch testified about the emotional pain and difficulties she suffered as a result of Ott's crimes (R1374: 90-93). She testified that she tried to charge back into the fire to save Lacey because she was so little and sweet and could not do it herself, and must have been so scared (R1374: 94).

[5]Ott's appointed lead trial counsel, Caine, had been close friends with the lead prosecutor, Wilson, and Wilson's wife for thirty years (R2166:30-31, 74). Prior to and during Ott's prosecution, Caine and Wilson were working together in a civil suit filed on behalf of Wilson's wife, wherein Caine was to be paid an undetermined contingency fee (R. 2166: 31-32, 75). Wilson served on the government board that hired Caine to represent Ott. During the board's discussions concerning Caine's appointment, Wilson made no mention of Caine's friendship with Wilson and his wife or of the civil lawsuit (R2166:76-77). While Wilson testified that he did not seek Caine's appointment and abstained from voting on it (R2166: 76-78, 83; State's Exhibit 4, page 2), Wilson admitted he had discussions with board members outside board meetings regarding their hiring of Caine (R2166:79). The contract between Caine and the board, which Wilson helped draft and Caine signed, specifically averred that Caine had no conflict of interest in representing Ott (R2166:33-34, 80).

Caine pled Ott guilty to aggravated murder in an agreement purporting to foreclose all judicial review of the plea after sentencing (R. 1130). But see, e.g., Utah Code Ann. § 77-13-6 (authorizing challenges to pleas through the Post Conviction Remedies Act); Constitution of Utah Article I § 5 ("The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it."); Julian v. State, 966 P.2d 249, 253 (Utah 1998) (recognizing the writ as the greatest protector of individual liberty, as requiring the Courts to "maintain their fundamental power to "guarantee fairness

trial counsel were constitutionally ineffective in several ways.[6]

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and equity in particular cases.").

As the Utah Supreme Court tacitly recognized before holding that it had no jurisdiction to reach the issue and that Ott would have to wait until post-conviction to litigate the claim, Utah law in effect at the time of the plea strongly indicated that Ott's accidental homicide of Lacey Lawrence did not constitute aggravated murder, see Pet. App. at 7; State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

Caine and Wilson actively litigated the Wilsons' civil suit during Ott's prosecution. The day after pleading Ott guilty to capital murder for a crime that apparently was not capital in an agreement that purported to shield the agreement from judicial scrutiny, Caine filed a memorandum opposing a motion to dismiss the civil suit (R. 2166: 33).

Wilson testified that Caine discussed defense strategy with Wilson in reaching the agreement concerning the defense mental health expert, who was called at the last minute without time to prepare and without the filing of the statutorily-required notice. Wilson and Caine agreed he would not be asked questions concerning how Ott's mental illness may have influenced his behavior or ability to control himself during the offenses (R. 1378:53-55; R2166:89). In the 23B remand hearing incident to the appeal, once the expert was given the necessary information and time to review it, he was able to explain how Ott's bipolar disorder, traumatic brain injuries, PTSD, and improperly prescribed medications likely caused him to misperceive that he was being attacked when Lawrence grabbed him from behind when he entered the bedroom, and to then lose control and react with extreme and excessive rage and violence without being able to curb his response or understand its excessiveness or the unlawfulness of his conduct (R2166:106-113).

Caine and Wilson also agreed between themselves to play the "Meet Lacey Lawrence" recording for the jury (R. 1377: 7). They also agreed to exclude the "Meet Lacey Lawrence" recording from the record that would be the foundation of Ott's appeal of right (R. 1377: 7).

No one informed Ott or the trial court of the friendship or lawsuit until after the Utah Supreme Court temporarily remanded the case to the trial court (R2166: 33, 34, 137, 176; R 2148).

[6]In addition to trial counsel's failure to oppose the admission of highly prejudicial victim impact evidence, Ott challenged trial counsel's failure to investigate the underlying facts and mitigation evidence, mishandling of Ott's competency and mental health issues, failure to investigate and present evidence of Ott's bipolar disorder, PTSD and brain damage, failure to object to anonymous jury proceedings, agreement to withhold key evidence from the appellate record despite its admission for the jurors during the penalty phase, and filing of a tardy and

With regard to victim impact evidence, Ott argued that counsel's failure to develop and assert state and federal arguments to oppose the improper admission of victim impact evidence, and counsel's agreement to play the "Meet Lacey Lawrence" recording for the jurors but then exclude it from the appellate record, evinced the actual conflict of interest harbored by Ott's lead trial counsel and constituted ineffective assistance of counsel.[7]

In the evidentiary remand to the trial court, in its brief, and at oral arguments on direct appeal, the State never contended that Booth v. Maryland, 482 U.S. 496 (1987), or related state and federal law limiting the presentation of victim impact evidence in capital sentencing proceedings did not apply. Rather, the State conceded that Payne v. Tennessee, 501 U.S. 808 (1991), applied, and that under Payne, the "Meet Lacey Lawrence" recording probably caused the most concern, and that the musical accompaniment to the recording may have been so

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inadequate challenge to the life without parole statute. See, e.g., Ott's opening brief at 37-113.

[7]E.g., Memorandum in support of 23B Remand at 2, 15-21, 36-44; Reply Memorandum in support of 23B Remand at 17-21; Opening brief of Appellant at 14-19, 34-35, 86-95; Reply brief of Appellant at 19-22.

The State's certiorari petition gives the incorrect impression that Ott's primary issue on appeal was an unpreserved claim concerning the improper admission of victim impact evidence, and argues as if Ott argued ineffective assistance as a means of avoiding the waiver of the victim impact claim. See State's petition at 10. As detailed above, the failure to oppose the admission of victim impact evidence was one part of Ott's multi-faceted conflict of interest and ineffective assistance of counsel claims. In asking the Utah Supreme Court to rule on issues that were not preserved, he asserted the plain error, cumulative error and exceptional circumstances doctrines. See Ott's opening brief at 113-121.

unduly prejudicial as to have rendered the trial fundamentally unfair under the Due Process Clause, although counsel for the State did not think it did.[8] The State took the position that trial counsel made a reasonable strategic choice to include all victim opinion statements and victim impact evidence to show Ott's remorse, empathy and acceptance of responsibility for his crimes.[9] At oral argument, after Justice Parrish observed that a motion in limine would have served to exclude improper evidence without the jury becoming aware of it, thus allowing Ott to show his remorse while shielding the jurors from unduly prejudicial evidence, the State argued that trial counsel made a strategic decision not to object, and that even if his performance in that regard was deficient, it was not prejudicial. See oral argument at minutes 36-37.

The Utah Supreme Court did not reach the majority of Ott's claims. It first ruled that it had no jurisdiction on direct appeal to determine whether Ott's accidental killing of Lacey Lawrence constituted aggravated murder under Utah law, ruling that Ott would have to wait until post-conviction proceedings to litigate that issue. Pet. App. at 7, 9-11. The court then held that trial counsel were constitutionally ineffective in representing Ott in failing to file a motion in limine or otherwise object to the presentation of victim impact evidence. E.g., Pet. App. at 26.

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[8] State's memorandum opposing 23B remand at 26-29; State's brief at 61-62; May 2008 oral arguments found at http://www.utcourts.gov/courts/sup/streams/ at approximately at minutes 31 through 37.

[9] See May 2008 oral arguments, *supra*, State's 23B memorandum at 26-29, State's brief at 63-66.

In a petition for rehearing, the State claimed for the first time that Booth did not apply to Ott's capital sentencing hearing because the prosecution agreed not to seek the death penalty. State's Petition for Rehearing at 3-5.[10] Ott answered that the State's claim was not timely made. Answer to Petition for Rehearing at 1-5. He also argued that under Strickland v. Washington, 466 U.S. 688, 689 (1984), counsel's failure to oppose the admission of victim impact evidence should be adjudged without the distorting influence of hindsight, and that because his case was a death penalty case at the time that trial counsel received notice of victim impact evidence, trial counsel were ineffective in failing to interpose Booth and other law to block the evidence. Answer to petition for rehearing at 5-15. The Utah Supreme Court denied rehearing without addressing the State's belated contention that Booth did not apply.

REASONS FOR DENYING THE WRIT

The State asks the Court to overrule the portion of Booth v. Maryland, 482

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[10]The State's certiorari petition makes no mention of its concessions during the direct appeal concerning the applicability of Payne, and argues as if its first opportunity to argue that Booth did not apply was in its rehearing petition, because neither party relied on Booth before the court decided Ott. See State's petition at 11. Ott plainly contended that the victim impact statements violated the Eighth Amendment, and he cited the portions of Payne which reiterate and cite to Booth's holding that victims' family members' opinions on the defendants, crimes and sentences are inadmissible under the Eighth Amendment. See Ott's 23B memorandum at 37 and opening brief at 87, relying on Payne v. Tennessee, 501 U.S. 808 (1991) at 829 n.2 (main opinion), and at 833 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy), and at 835 (concurring opinion of Justice Souter, joined by Justice Kennedy).

U.S. 496 (1987), pertaining to victim opinion testimony. It argues as a fallback position that Booth did not apply in Ott's case because the prosecution ultimately opted not to seek the death penalty. Ott addresses the State's contentions in reverse order, as the Court normally overrules its precedents only as a last resort.

The Court should deny the writ on the question concerning whether Booth applies to a capital penalty phase trial wherein death is not a sentencing option but the jury returns a verdict of life without parole. The State failed to raise its current claims in a timely manner in the state courts, but instead took a contrary position, that Payne applied to Ott's sentencing proceeding.

Like the explicit holding of Ott, the Utah Court of Appeals has held that Ott bars victim opinion statements only in capital penalty phase trials. Victim opinion evidence remains admissible in non-capital sentencing hearings in Utah. Utah's jurisprudence on the applicability of Booth comports with this Court's case law and that of other jurisdictions. On the unique procedural facts of this case, the Utah Supreme Court correctly determined that trial counsel were ineffective in having failed to assert Booth.

The Court should not overrule Booth's proscription of victim opinion testimony. Booth is an important part of the fabric of our capital sentencing law which has been followed by the lower courts without difficulty for over twenty years. The portion of Booth pertaining to victim opinion evidence was soundly reasoned, and there is no persuasive reason to reconsider it.

Ott is not a suitable case for reconsideration of the portion of Booth

pertaining to victim opinion testimony. If the Court overruled Booth, Ott would nonetheless be entitled to reversal in this Court or on remand on a number of alternative bases. Trial counsel were constitutionally ineffective in multiple instances, and lead counsel labored under an actual conflict of interest which resulted in the prosecution's intrusion into Ott's Sixth Amendment right to counsel. The "Meet Lacey Lawrence" recording, victim impact evidence, and victim opinion testimony were inadmissible under Utah law, and the "Meet Lacey Lawrence" recording violated Payne v. Tennessee, 501 U.S. 808, 825 (1991). Trial counsel were thus constitutionally ineffective in failing to oppose the victim impact evidence under authorities other than Booth. The procedural history of the case and the ineffective assistance framework of the opinion below render Ott unduly cumbersome for reconsideration of Booth. In the event the Court wishes to reconsider Booth, the Court should await a more appropriate and true capital case.[1]

I. THIS COURT SHOULD DECLINE TO REVIEW WHETHER THE UTAH SUPREME COURT PROPERLY APPLIED BOOTH TO OTT'S SENTENCING PROCEEDING.

A. THE ISSUES ARE NOT PROPERLY BEFORE THE COURT.

This Court generally refuses to address claims that were not raised or ruled on below, particularly in cases wherein the lower courts were state courts. See, e.g.,

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[1]Utah law in effect at the time of the plea strongly indicated that Ott's accidental homicide of Lacey Lawrence did not constitute aggravated murder, see Pet. App. at 7; State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

Clark v. Arizona, 548 U.S. 735, 761-65 (2006). Whether viewed as jurisdictional or prudential, this requirement serves the interest of comity in our federalist system, by insuring that state courts have the opportunity to address federal issues. It also serves judicial economy, as it encourages early resolution of issues in state courts, thus alleviating the need for federal review. See Adams v. Robertson, 520 U.S. 83, 90 (1997). The requirement also insures that the matters are properly litigated below so that this Court's decisions are premised on adequate records. Id. at 90-91.

As detailed above, the State failed to timely argue in the state courts that this Court's victim opinion and victim impact jurisprudence under Booth and Payne did not apply because the death penalty was removed as a sentencing option after the trial began. Rather, after consistently conceding the applicability of Payne, the State made the contradictory claim for the first time on rehearing. Arguments made for the first time on rehearing are untimely for purposes of review on certiorari.[12] Because the State did not present its claims in timely fashion during the remand proceedings or on direct appeal, but instead conceded the applicability of the Eighth Amendment victim opinion jurisprudence in the lower state courts up until filing the contradictory petition for rehearing, this Court should deny

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[12]See, Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here.")

The Utah Supreme Court generally declines to address arguments made for the first time on rehearing. See Swanson v. Sims, 170 P. 774, 778 (Utah 1917). This is particularly so when arguments made on rehearing are inconsistent with prior arguments made to the court. See Lockhart Co. v. Anderson, 646 P.2d 678, 681 (Utah 1982)

certiorari. See Adams and Johnson, *supra*.

B. THE UTAH SUPREME COURT'S HOLDING IS LIMITED TO CAPITAL SENTENCING PROCEEDINGS AND IS CONSISTENT WITH OTHER DECISIONS APPLYING BOOTH.

The Utah Supreme Court's holding in Ott is expressly limited to capital cases. The opinion states:

> Specifically, we hold that counsel was objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings.

Pet. App. at 32. Consistent with Ott's holding and procedural context, the Utah Court of Appeals has held in a published opinion that Ott does not apply to non-capital sentencing hearings. Rather, Ott prohibits victims from opining on sentences "only in capital sentencing hearings[.]" State v. Shaffer, 2010 UT App 240, ¶ 31 n.8, 239 P.3d 285.

Ott is thus consistent with the cases cited in footnote 12 of the State's certiorari petition, which similarly limit the application of Booth to capital cases.[13]

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[13]See United States v. Horsfall, 552 F.3d 1275, 1284 (11th Cir. 2008), cert. denied, 129 S.Ct. 2034 (2009) (recognizing that Booth is limited to capital sentencing proceedings in rejecting plain error claim in non-capital child pornography case); Hatcher v. Duckworth, 917 F.2d 1306 at *1 and *2 (7th Cir. 1990 (unpublished) (refusing to apply Booth in a robbery case on habeas because Booth applies only in capital cases); United States v. Santana, 908 F.2d 506, 507 (9th Cir. 1990) (affirming court's consideration of victim impact evidence in non-capital bank robbery case, recognizing that Booth applies only in capital cases); Disotell v. Warden La. Corr. Inst. for Women, 2010 WL 2483420, *6 (W.D. La. 2010) (slip copy) (rejecting Payne challenge to victim impact evidence in non-capital manslaughter habeas case); Razo v. Blair, No. 08-1106-PHX-NVW, 2010 WL 1433487, * 15 (D.

Four of the State's cases reject Booth claims in capital cases wherein the death penalty was not a sentencing option. They differ from Ott in two ways. First, none of them involved ineffective assistance of trial counsel who failed to oppose the admission of victim impact evidence when the case was a death penalty case, as Ott did. Second, they all involve sentences imposed by judges, rather than juries, and thus do not involve the dangers Booth sought to avoid which required reversal in Ott – victim impact evidence unduly influencing jurors to impose sentences in an arbitrary and capricious fashion, see Booth, 482 U.S. at 503.[14]

Ariz. Feb. 11, 2010) (slip copy) (rejecting Payne challenge to victim impact evidence in non-capital habeas case involving manslaughter and lesser charges); Mahan v. Cate, No. CV08-04699 ABC, 2009 WL 3244911, *2, (C.D. Calif. Oct. 2, 2009) (unreported) (rejecting Payne challenge to victim impact evidence in non-capital habeas case involving sodomy charges); Cooey v. Anderson, 988 F.Supp. 1066 (N.D. Ohio 1997) at 1083-87 (finding claim of Booth error in guilt phase was procedurally defaulted) and at 1089-91 (N.D. Ohio 1997) (deferring to state court's rejection of Booth claim in death penalty case because state court found that trial court considered victim impact statements only in sentencing on non-capital crimes); State v. Tyler, 565 S.E.2d 368, 376-77 and n.11 (W. Va. 2002) (rejecting Booth claim in robbery case because court did not give undue emphasis to victim impact testimony; recognizing that Booth applies only in capital sentencing proceedings).

[14]See People v. Ratzke, 625 N.E.2d 1004, 1008, 1017 (Ill. 1993) (court, not jury, properly relied on victim impact evidence in case where jury found defendant ineligible for death penalty prior to sentencing hearing; recognizing that Booth does not apply to non-capital sentencing proceedings); Randell v. State, 846 P.2d 278, 280 (Nev. 1993) (*per curiam*) (court, not jury, properly considered victim impact statement in case where death penalty removed as a sentencing option in plea bargain; court recognized that Booth does not apply to non-capital cases); State v. Searcy, 798 P.2d 914, 919 (Idaho 1990) (rejecting Booth claim in death penalty case wherein life sentence was reached by a court, rather than a jury); Kills On Top v. State, 15 P.3d 422, 437 (Mont. 2000) (rejecting Booth claim where court, not jury, imposed sentences of life and life without parole, after death was removed as a sentencing option by state supreme court).

The State claims that the highest courts of Ohio and Kansas mistakenly extend Booth beyond its holding and core reasoning. State's petition at 28-29, citing State v. Harwell, 102 Ohio St. 3d 128, 807 N.E.2d 330 (2004); and State v. Gideon, 257 Kan. 591, 894 P.2d 850 (1995). Assuming this were true, it would not justify a grant of certiorari in Ott's case. Review of Harwell and Gideon confirms that like Ott, they do not improperly extend Booth.

State v. Harwell, 102 Ohio St. 3d 128, 807 N.E.2d 330 (2004), interpreted the Ohio sentencing scheme in determining that the offense charged against the defendant was capital, and entitled him to the same procedural protections applicable in all capital cases, regardless of whether death is a sentencing option. Id. at 331-32. One of the procedural protections at issue in Harwell was a victim impact claim, and the Harwell opinion referred to another case on victim impact evidence which relied in part on Booth in reversing a death sentence.[15] However, Harwell did not mention, cite to or rely on Booth or any other federal constitutional provisions or authorities in interpreting the Ohio statutory scheme. See id.

State v. Gideon, 257 Kan. 591, 894 P.2d 850 (1995), determined that the defendant's forty year sentence imposed by a court did not violate a Kansas statute forbidding sentences to enter on the basis of "passion, prejudice or any other arbitrary factor," and rejected Gideon's complaints about victim impact testimony in that context. Id., 894 P.2d at 862-64. After providing a general discussion of victim

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[15]Id. at 331, citing State v. Huertas, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990), overruling recognized, Keith v. Mitchell, 455 F.2d 662 (6th Cir. 2006).

impact law addressing Payne v. Tennessee, 510 U.S. 808 (1991); Darden v. Wainwright, 477 U.S. 168 (1986), and a state law case interpreting a Minnesota victim impact statute, State v. Yanez, 469 N.W.2d 452 (Minn. App. 1991), the Gideon court reasonably directed trial courts presiding over jury sentencing proceedings to exercise control in admitting victim impact evidence to avoid reversible error. Gideon, 894 P.2d at 864. Like Ott and Harwell, Gideon did not extend Booth.

Because there is no split of authority over whether Booth applies in a capital penalty phase trial such as Ott's, this Court should deny the State's petition for certiorari.

C. THE EIGHTH AMENDMENT APPLIES TO LIFE WITHOUT PAROLE SENTENCES.

Assuming that Ott is properly read as applying Booth and Payne to a capital case wherein death is not a possibility, without regard to the procedural history or ineffective assistance of counsel actually involved, Ott is correct. The rationale behind Booth's bar of victim opinion statements in capital penalty phase trials is that such evidence "can serve no other purpose than to inflame the jury and to divert it from deciding the case on the relevant evidence concerning the crime and the defendant." 482 U.S. at 508. While the rationale does not apply to ordinary non-capital sentencing hearings before judges, who enjoy great discretion in considering virtually unlimited information in sentencing hearings, e.g., Williams v. New York, 337 U.S. 241, 246 (1949), the rationale applies directly and equally to a

capital penalty phase trial, wherein the jury decides the defendant's ultimate fate of life in prison without parole or death.

This Court recently held that Eighth Amendment principles designed to avoid arbitrary sentencing in capital prosecutions apply to cases involving life without parole sentences, because of the severity of that sentence. See Graham v. Florida, 176 L.Ed.2d 825, 130 S.Ct. 2011 (2010). In Graham, in the course of explaining why the Eighth Amendment does not permit a life without parole sentence to be meted out on a juvenile non-homicide offender, the Court reiterated its Eighth Amendment jurisprudence accounting for the severity of the life without parole sentence. Graham, 130 S.Ct. at 2027-28, discussing, e.g., Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). The Court recognized that a sentence of life in prison without parole shares characteristics with a death sentence, because it irrevocably forfeits the offender's most basic liberties, extinguishes all meaningful hope for relief, and guarantees that the offender will live the remainder of his life and die in prison, regardless of any progress or changes he might achieve or experience. See id.

Given the final, destructive, and utterly demoralizing nature of a life without parole sentence, see id., jurors considering such a sentence should be protected from highly prejudicial evidence which has no meaningful probative value, such as the victims' family members' opinions and characterizations of the defendant, his crimes and his deserved sentence. See Booth. A sentence with such severe consequences to the offender and society as a whole should not turn on heartfelt

personal opinions. Rather, it should be reached only through the exercise of carefully channeled discretion Cf. id.

To the extent that pre-Graham cases may be inconsistent with this, they are subject to reevaluation in light of Graham. At a minimum, this Court should allow the issue to develop in the lower courts and wait to decide the issue in a case wherein Graham has been considered.

D. OTT IS CORRECTLY DECIDED.

Review of the procedural history of the case and the law governing Ott's claim of ineffective assistance of counsel demonstrates why the State was correct in its concessions below that Payne controls. Strickland v. Washington, 466 U.S. 688 (1984), requires courts evaluating deficient performance claims to assess counsel's decisions, actions and omissions in context at the time they were made, without the "distorting effects of hindsight." Id. at 689. Trial counsel had the duty to investigate both the facts and the law prior to Ott's trial, and to assert current law and protect Ott's rights at all times. See, e.g., Strickland at 687-88, 690; ABA Guidelines 10.8 and 10.10.1.[16] Trial counsel's duty to develop and present state and federal arguments exploring and opposing the admission of victim impact evidence arose prior to trial, see id., certainly no later than when the prosecution gave notice

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[16]Because Ott's was a death penalty case up until Ott pled to capital murder and the death penalty was removed as a sentencing option, the ABA standards were the guidelines applicable to trial counsel's pretrial preparation. See Wiggins v. Smith, 539 U.S. 510, 522 (2003) (characterizing these guidelines as "standards to which we long have referred as 'guides to determining what is reasonable.'").

days before the trial began of its intent to call Lacey's mother to testify despite not having been involved in Ott's crimes, and to present the "Meet Lacey Lawrence" recording. The case was a death penalty case at that point; it was only in the midst of jury selection that the prosecution withdrew death as a sentencing option in exchange for Ott's Alford plea (R. 1121-1133, 1135). The fact that death was later removed as a sentencing option after counsel should have sought and obtained a ruling excluding the improper victim impact evidence does not factor into the deficient performance analysis of counsel's performance when Ott was facing the death penalty. See Strickland, 466 U.S. at 689.

Ott was prejudiced by trial counsel's failure to obtain a ruling excluding the victim opinion evidence, regardless of the removal of death as a sentencing option in the plea bargain. At the time of trial, Utah law limited victim opinion evidence from penalty phase trials, regardless of the removal of death as a sentencing option.[17] Given the legal context prevailing at the time of trial, it is not reasonable

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[17]The Utah statute governing all capital sentencing proceedings limited the presentation of victim impact evidence and did not permit the admission of victim opinion evidence, regardless of whether death or life without parole was the maximum potential penalty. It indicated that evidence may be admitted concerning "the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims[.]" Utah Code Ann. § 76-3-207 (2)(a)(iii). Under Utah law, the fact that the statute specified the types of victim impact evidence which were admissible is read as a legislative exclusion of other types of victim impact evidence. See, e.g. Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another).

Well before Ott's trial, law from the Utah Supreme Court recognized the dangers posed by victim impact evidence, and suggested that the admission of such

to speculate that the trial court or even the prosecutor would have risked reversal by admitting or presenting this evidence once the plea bargain was struck. Rather, the reasonable likelihoods are that had trial counsel fulfilled their obligations to prepare for Ott's trial and assert his legal rights consistently with the defense theory of the case, the trial court would have maintained the pretrial order excluding victim impact evidence after the plea bargain was struck, and that at least one more juror would have voted for a sentence less harsh than life without parole. Ott was thus prejudiced by trial counsel's objectively deficient performance.[18] Because Ott is correctly decided, this Court should deny certiorari.

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evidence might be found to violate the Utah Constitution. See State v. Carter, 888 P.2d 629, 650-53 and accompanying notes (Utah), cert. denied, 516 U.S. 858 (1995). Cf. State v. Kell, 2002 UT 106, at ¶ 53 n.17, 61 P.3d 1019 (finding the admission of victim impact evidence harmless but citing with approval State v. Muhammad, 678 A.2d 164 (N.J. 1996), which carefully circumscribed the admission of this evidence so that unduly prejudicial victim impact evidence is not admitted).

At the time of this trial, Fourteenth Amendment authorities barred verdicts resulting from unfair prejudice, and were not limited in application to death penalty cases. E.g. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The victim opinion testimony and much of the victim impact evidence at issue in this case were unfairly prejudicial, and would have been subject to the Fourteenth Amendment bar, regardless of which sentence was at issue. Cf. id.

Victims' family members' personal opinions concerning the defendants, the crimes and sentences are excluded because they are not truly probative, but instead tend to result in sentences based on caprice or emotion. See Booth, 482 U.S. at 508-09. Utah law calls for the exclusion of highly prejudicial evidence which is lacking in probative value. See, e.g., Utah Rule of Evidence 403.

[18]See Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring proof of prejudice: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); Wiggins v. Smith, 539 U.S. 510, 537 (2003) (reversing capital sentence for ineffective assistance after concluding that if the defense case had been handled competently, there was "a reasonable probability that at least one juror would have struck a different

II. THIS COURT SHOULD NOT CONSIDER OVERRULING BOOTH IN THIS CASE.

A. THERE IS NO QUANDARY OVER THE LAW OF BOOTH, WHICH HAS BEEN SETTLED FOR OVER TWENTY-THREE YEARS.

The State argues as if Payne opened a constitutional question that has been left open for two decades concerning the admissibility of victim opinion evidence in capital penalty phase trials. State's petition at 15. As the State's petition demonstrates, the vast majority of courts in this country have been following Booth since it was written twenty-three years ago, and have not read Payne's overruling of a portion of Booth as a total overruling of Booth. State's Petition at 24-25 (citing cases). The courts are correct in this regard, because once this Court answers a constitutional question, the question is no longer open.[19]

The State argues that case law from Oklahoma demonstrates that the lower courts are confused by this Court's jurisprudence. State's petition at 12-13, 25-27.[20] Oklahoma, like Booth and Ott, bars victim opinion evidence about the defendants,

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balance.").

[19]See, e.g., Rivers v. Roadway Exp. Inc., 511 U.S. 298, 312-313 (1994) (lower courts must respect this Court's interpretation of the law).

[20]In arguing that the lower courts are confused because Booth did not involve sentencing recommendations, but Payne interpreted Booth incorrectly as if it did, the Amicus relies solely on Oklahoma law as reflecting this purported confusion. See Amicus brief at 11-12. Oklahoma's case law does not reflect the confusion asserted by the Amicus, but instead ambivalently reads Payne as if it overruled Booth completely. See, e.g., Murphy v. State, 47 P.3d 876, 885 (Okla. Crim. App. 2002), cert. denied, 438 U.S. 985 (2003).

the crimes, and the appropriate sentences when the prejudicial effect of such evidence outweighs its probative value, albeit under the Due Process Clause of the Fourteenth Amendment and state law.[21] The Oklahoma court has held that it was error to admit victim opinion evidence that was similar to or less egregious than that requiring reversal in Ott.[22] Thus, consistent with Booth and Ott, albeit with different jurisprudential underpinnings, Oklahoma would have found error in the admission of the opinion evidence such as caused the reversal here. The similarity in ultimate outcomes may be one reason the Court has denied certiorari in the Oklahoma cases.[23]

In the event Oklahoma's views of Booth did produce divergent outcomes, federal habeas is the remedy designed to correct such errors. The Tenth Circuit properly reads Booth as controlling precedent in cases involving victim's family members' opinions about the defendant, crime and appropriate penalty. See, e.g., Hain v. Gibson, 287 F.3d 1224,1237-39 (10th Cir. 2002). The Tenth Circuit is fully

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[21]See Ledbetter v. State, 933 P.2d 880, 890-91 (Okl. Crim.), cert. denied, 525 U.S. 1057 (1998), and Turrentine v. State, 965 P.2d 955, 980-81 (Okl. Crim.), cert. denied, 525 U.S. 1057 (1998).

[22]See Ledbetter v. State, *supra*, 933 P.2d at 891 (recognizing error in admission of opinions that crime was "brutal," a "selfish act," that the victim was "butchered like an animal," and statement that the victim's child "somehow knew" in his or her "heart that he meant it" when he threatened to kill child's mother), and Turrentine v. State, *supra*, 965 P.2d at 981 (recognizing error in admission of opinion that crime was "brutal").

[23]See Ledbetter and Turrentine, *supra*, and Murphy v. State, 47 P.3d 876 (Okla. Crim. App.) (2002), cert. denied, 538 U.S. 985 (2003).

able to review and correct Oklahoma's interpretations of Booth and Payne. See Hain v. Gibson, *supra*, and Hooper v. Mullin, 314 F.3d 1162, 1174 (10th Cir. 2002).

Assuming that this Court wishes to correct Oklahoma, this case would not serve as an efficient means to do so, because as Ott demonstrates, Utah honors this Court's authority as expressed in Booth and Payne.[24]

Because there is no meaningful confusion or disagreement in the lower courts regarding the precedential value of Booth, this Court should deny certiorari in this case.

B. THERE IS NO COMPELLING REASON TO REVISIT BOOTH.

The doctrine of *stare decisis*, under which the Court continues to honor its prior precedents, is valuable because it promotes the stability of our legal system and respect for the opinions of the Court. See, e.g., Lawrence v. Texas, 539 U.S. 558, 577 (2003). In deciding whether to adhere to *stare decisis*, the Court considers the workability of the precedent at issue, whether it was premised on a sound rationale, the extent to which the precedent is relied on, and the age of the precedent. See, e.g., Citizens United v. Federal Election Com'n., 130 S.Ct. 876, 911-12 (2010). The Court's "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." Id. There is no such convincing reason to justify reconsideration of Booth.

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[24]See Pet. App. at 15-16 (recognizing that Booth retains its viability after Payne with regard to victim's family members' opinions regarding the defendant's character and crime and the sentence he should receive).

Over twenty-three years ago in Booth, a death penalty case, the Court held that victims' family members' opinions and characterizations of the defendants and their crimes, and opinions as to appropriate sentences were inadmissible in capital penalty phase trials. 482 U.S. at 508-09.[25] The rationale for the holding was sound: such opinions are not truly evidence, and do not illuminate the unique sentencing inquiry in capital penalty phase trials, which should focus on the circumstances of the crime, the history and record of those accused, and their moral culpability. Id. at 502. Rather, such opinions tend to divert the jurors from the proper inquiry, inflame their emotions, and result in verdicts which are not based on reason. Id. at 508-09. The dissenting Justices in Booth did not take issue with the victim opinion aspect of the opinion. Rather, Justices White and Scalia both objected to the portion of Booth excluding evidence of the impact of the crime, the portion that was later overruled in Payne v. Tennessee. Justice White's dissent, joined by then-Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, argued that the

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[25]The Amicus complains that Booth did not involve victims' family members' sentencing recommendations, and that Payne mis spoke and caused confusion in the lower courts in reading Booth as forbidding victims' family member to give sentencing recommendations in capital cases. Amicus brief at 2-13. Booth actually did involve this very type of evidence. See 482 U.S. 496, at 508 (daughter of murder victims testified that she did not believe the defendants could be rehabilitated, and did believe that they ought not to be able to repeat their crimes; son of murder victims testified that he did not believe the defendants should be able to get away with doing something like they did). Thus, Payne properly recognized the continuing validity of Booth's proscription of this type of evidence. See Payne, 501 U.S. 808, at 830 n.2 (majority opinion); id. at 833 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy); and at 835 n.1 (concurring opinion of Justice Souter, joined by Justice Kennedy).

Maryland state legislature was within constitutional bounds in codifying that the extent of criminal punishment could account for the extent of harm caused by the defendant's crimes. Id. at 515-16. He argued that capital jurors should be acquainted with the victims and the unique loss their deaths caused to their families and communities, to counterbalance the jurors' learning of the individual circumstances of the defendants in capital penalty phase trials. Id. at 516-17. However, consistent with the enduring holding of Booth, Justice White's dissent suggested that to the degree that victims' family members opinions on issues such as the defendant's potential for rehabilitation were inadmissible, this should not bar the evidence of the impact of the defendant's crimes. See id. at 518-19. Justice Scalia's separate dissent, joined by then-Chief Justice Rehnquist, Justice White and Justice O'Connor, criticized the rational of Booth's victim impact holding, that death penalty analysis should focus on moral culpability and exclude consideration of evidence of the magnitude of the harm caused. Id. at 519-21. Justice Scalia's opinion echoed the principle of federalism recognized in Justice White's opinion in explaining that the state legislature had the authority to adopt the position asserted by the victims' rights movement that the full extent of suffering caused by the defendant should be considered in capital penalty phase trials. Id. at 520. Justice Scalia's opinion did not criticize or challenge Booth's other holding that victims' family members' opinions and characterizations of the defendants and their crimes and opinions as to appropriate sentences were not admissible evidence in capital penalty phase trials under the Eighth Amendment.

In adopting the Booth dissenting Justices' positions in Payne, the Court overruled only that portion of Booth which limited the presentation of victim impact evidence, and recognized that states are within their rights to permit the presentation of evidence concerning the extent of harm caused by the defendants' crimes in capital penalty phase trials. See Payne, 501 U.S. at 817-827. The Court left intact the portion of Booth recognizing that victim opinions regarding the defendants, crimes and appropriate punishment were constitutionally inadmissible.[26]

As the State's petition and this brief confirm, the lower state and federal courts have been adhering to and relying on Booth's proscription of victim opinion evidence in capital cases for nearly a quarter of a century. Over time, Booth has proven to be a workable standard because the underlying rationale is sound: capital penalty phase juries should mete out the drastic sentences involved in capital cases on the basis of evidence focused on the defendants and the circumstances of their crimes, and should not be diverted from or tainted in that difficult inquiry by inflammatory victim opinion evidence. See Booth, *supra*. Because adhering to Booth does not put this Court on a course headed toward "sure error," the Court should maintain Booth. See Citizens United, *supra*.

C. IF THE COURT WERE INCLINED TO RECONSIDER BOOTH'S HOLDING ON VICTIM OPINION EVIDENCE, THE

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[26]See Payne, 501 U.S. at 830 n.2 (majority opinion); id. at 833 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy); and at 835 n.1 (concurring opinion of Justice Souter, joined by Justice Kennedy).

COURT SHOULD AWAIT AN APPROPRIATE CASE.

The State's petition gives the incorrect impression that the Utah Supreme Court's holding was based solely on Booth, and does not mention its actual holding based on Strickland and the law of ineffective assistance of counsel. See State's petition at 10.[27] The questions framed in the State's petition similarly sidestep the fact that Ott is a Sixth Amendment case holding that trial counsel were constitutionally ineffective in failing to oppose the admission of victim opinion testimony.[28]

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[27]In quoting the Utah Supreme Court's conclusion as to prejudice, the State omits the traditional language from Strickland, which requires proof of a reasonable probability of a different result, which is explained as an undermining of the court's confidence in the outcome, see id, 466 U.S. 668, 694 (1984). Compare State's petition at 11 ("The court concluded that 'but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence.' App. 27.") with Ott, 2010 UT 1, ¶ 41 ("[T]here is a reasonable probability that but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence. The admission of the evidence sufficiently undermines our confidence in Mr. Ott's sentence.").

[28]The State's failure to accurately identify the questions to be addressed on certiorari is an independent basis for denying its petition. Consistent with this Court's own interest in its judicial economy, subsection (1)(a) of this Court's rule 14 indicates that the Court will consider on certiorari only those questions raised in certiorari petition or fairly included therein. See id. Questions which are related or complementary are not considered fairly included. See, e.g., Yee v. Escondido, 503 U.S. 519, 537 (1992) (question as to whether statute effected a physical taking did not encompass question as to whether it effected a regulatory taking). Questions which require separate factual and legal analyses from stated questions are not considered fairly included. See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 30-31 (1994) (*per curiam*) (certiorari improvidently granted because Court could not reach merits without addressing issues which were not raised or fairly included in questions presented in certiorari petition).

Ott is a Sixth Amendment case which presents a far less than ideal context for reconsideration of Booth's Eighth Amendment holding regarding victim opinion testimony. The State's petition should be denied because, as a result of the clear and repeated violations of his Sixth Amendment rights, Ott would be entitled to reversal even if Booth were overruled. The inadmissibility of the victim opinion and impact evidence undermining Ott's sentence under Utah law and the Fourteenth Amendment are additional reasons Ott would be entitled to relief without regard to the Court's revisitation of Booth.[29]

1. The Sixth Amendment Violations Would Merit Relief Regardless of the Court's Reconsideration of Booth.

Ott is entitled to reversal of his sentence and ultimately his convictions as a result of three interrelated Sixth Amendment violations: trial counsel's constitutional ineffectiveness, trial counsel's actual conflict of interest and its adverse effects on counsel's representation of Ott, and prejudicial governmental intrusion into Ott's right to counsel.

The Sixth Amendment provides the accused with the right to the "Assistance of Counsel for his defence." This right is essential to the fairness of criminal trials and the reliability of the verdicts in our adversary system. See, e.g., United States

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[29]The Amicus seeks a limited review of Booth's holding regarding victim opinions as to appropriate sentences, but does not seek review of whether Booth should continue to bar victim opinions on the defendants and their crimes. See Amicus brief *passim*. Because Ott's reversal hinges as much or more on the latter type of victim opinions as it does on their opinions as to the appropriate sentence, the grant of certiorari sought by the Amicus would not result in reversal.

v. Cronic, 466 U.S. 648, 658 (1984). An ineffective assistance claim has two components. First, Ott must identify the specific acts or omissions he claims fell below an objective standard of reasonableness in the context of the law prevailing at the time of trial, without the distorting effects of hindsight. Strickland v. Washington, 466 U.S. 668, 687-88, 690 (1984). Second, Ott must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687. Trial counsel's failure to investigate the underlying facts and mitigation evidence, mishandling of Ott's competency and mental health issues, failure to investigate and present evidence of Ott's bipolar disorder, PTSD and brain damage, failure to object to anonymous jury proceedings, agreement to withhold key evidence from the appellate record despite its admission for the jurors during the penalty phase, and filing of a tardy and inadequate challenge to the life without parole statute are repeated examples of objectively deficient and prejudicial performance of trial counsel. See, e.g., Ott's opening brief at 24-113. They likewise evince adverse effects of trial counsel's actual conflict of interest and in some instances also prove prejudicial governmental intrusion into Ott's Sixth Amendment right to counsel, discussed *infra*. See id.

The Sixth Amendment right to counsel is violated by governmental intrusion into the attorney-client relationship if the intrusion was prejudicial. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977). Four factors guide the prejudice inquiry when government intrusion occurs: whether governmental intrusion was purposeful, whether evidence offered at trial resulted directly or indirectly from

that intrusion, whether the intrusion resulted in the prosecutor's being privy to the defense strategy or preparation, and whether the defendant was substantially harmed in any other way by the intrusion. Id. at 554.

When criminal defense lawyers operate under conflicts of interest, they breach "the duty of loyalty, perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984). Conflicts of interest derogate the entire adversarial process in ways that may not be reflected on the face of the record, from trial preparation, to plea bargaining, to formulation of trial strategy, to trial performance, and so on. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978) (involving representation of multiple clients by one lawyer).

Traditional harmless error analysis does not apply to Sixth Amendment violations which pervade criminal cases. See, e.g., Satterwhite v. Texas, 486 U.S. 249, 256 (1988). Prejudice is presumed in the conflict of interest context because lawyers have professional obligations to avoid conflicts of interest and because courts have the ability to inquire into such conflicts. Strickland, 466 U.S. at 692 (citing Fed. Rule Crim. Proc. 44(c)). Finally, prejudice is presumed because conflicts borne by defense counsel often influence lawyers not to do things which would disserve the conflicting interests, and thus the record is often lacking in evidence as a result of the conflict, obfuscating a traditional evidentiary prejudice inquiry. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978) (involving representation of multiple clients by one lawyer).

Wood v. Georgia, 450 U.S. 261 (1981), is analogous to the present case,

wherein trial counsel was beholden to the prosecutor, his personal and longtime friend, who not only was instrumental in trial counsel's being hired to serve as appointed counsel for Ott, but also, hired trial counsel for an undetermined contingency fee in the prosecutor's wife's unrelated civil suit which they were jointly litigating simultaneously to Ott's prosecution. Wood involved probationers whose cases were accepted on certiorari. The Court did not address the issue for which certiorari was granted, but remanded the case to the trial court to inquire into the apparent due process violation posed by the fact that the defendants' lawyer was being paid by the defendants' employer, whose interests were adverse to the defendants' in the probation revocation proceedings. Id. at 264-66. The defendants were convicted of distributing pornography, and the record reflected that their employer had an agreement with the employees to pay attorney fees, bonds, and fines. Id. at 266. The employer honored the agreement to a point, but then did not pay the fines underlying the probation revocation order. The Court suspected the employer's failure to pay might have been an effort to establish constitutional precedent alleviating the need for the employer to pay the employees' fines in the future. Id. at 267. The Court recognized that the attorney's employment by the defendants' employer may well have created a conflict of interest which resulted in the lawyer's failure to protect the defendants from probation revocation. Id., 450 U.S. at 267-68 and n.14.

While Wood involved an attorney representing multiple defendants, it focused on the conflict problems posed by third party payment of attorneys, such as

when the payor prevents the lawyer from presenting evidence which might be used to defend the accused but which might reflect badly on the payor. Id. at 269-71 and accompanying notes. The Court held that the potential conflict of interest posed by the lawyer's employment by the defendants' employer was sufficiently clear in Wood that the trial court should have recognized it and inquired into it. Id. at 272.

In Mickens v. Taylor, 535 U.S. 162 (2002), the Court explained that "actual conflict of interest," which requires automatic reversal, is established if "'counsel [were] influenced in [their] basic strategic decisions by the interests of the employer who hired [them]'" or if a conflict of interest adversely affected that attorney's performance. Mickens, 535 U.S. at 172, quoting Wood, 450 U.S. at 170-72. As examples of adverse effect, the Court referred to a lawyer's failing to cross-examine an adverse witness or failing to object to inadmissible evidence. Id. Traditional evidentiary prejudice under Strickland v. Washington need not be shown if an actual conflict of interest is present. Id.

Consistent with Wood and Mickens, an actual conflict of interest is properly recognized as a result of a criminal defense attorney's "social, professional and financial relationship" with the prosecutor, and will justify the presumption of prejudice, provided that there is proof of adverse effect on the defense attorney's performance.[30]

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[30]See Patterson v. Virginia Department of Corrections, 172 F.3d 44 at *3 (4th Cir. 1998) (unpublished opinion) (recognizing that an actual conflict of interest might stem from trial counsel's "social, financial and professional relationship with the prosecutor," but finding that there was no adverse effect to prove the Sixth

Ott's appointed lead trial counsel, Caine, labored under an actual conflict of interest stemming from his thirty year friendship with the prosecutor, Wilson, and his wife, from Caine's simultaneous representation of Ott and the prosecutor's wife in the civil suit wherein he was working with the prosecutor to earn a then-undetermined contingency fee, and from the prosecutor's facilitating trial counsel's appointment to represent Ott without revealing the conflict. See n.5, *supra*.

The conflict of interest influenced trial counsel's basic strategic decisions and adversely affected his performance in many ways, and also allowed governmental intrusion into and interference with Ott's Sixth Amendment rights. Caine pled Ott guilty to aggravated murder in an agreement purporting to foreclose all judicial review of the plea after sentencing (R. 1130).[31] Utah law in effect at the time of the plea strongly indicated that Ott's accidental homicide of Lacey Lawrence did not constitute aggravated murder.[32] Caine and Wilson actively litigated the Wilsons' civil suit during Ott's prosecution; the day after pleading Ott guilty to capital murder for a crime that apparently was not capital in an agreement that purported

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Amendment violation).

[31] But see, e.g., Utah Code Ann. § 77-13-6 (authorizing challenges to pleas through the Post Conviction Remedies Act); Constitution of Utah Article I § 5 ("The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it."); Julian v. State, 966 P.2d 249, 253 (Utah 1998) (recognizing the writ as the greatest protector of individual liberty, as requiring the Courts to "maintain their fundamental power to "guarantee fairness and equity in particular cases.").

[32] See Pet. App. at 7, 9-11; State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

to shield the agreement from judicial scrutiny, Caine filed a memorandum opposing a motion to dismiss the civil suit (R. 2166: 33).

Wilson testified that Caine discussed defense strategy with Wilson in reaching the agreement concerning the defense mental health expert, who was called at the last minute without time to prepare and without the filing of the statutorily-required notice. Wilson and Caine agreed that Caine would not ask the expert questions concerning how Ott's mental illness may have influenced his behavior or ability to control himself during the offenses (R. 1378:53-55; R2166:89). In the 23B remand hearing incident to the appeal, once the expert was given the necessary information and time to review it, he was able to explain how Ott's bipolar disorder, traumatic brain injuries, PTSD, and improperly prescribed medications likely caused him to misperceive that he was being attacked when Lawrence grabbed him from behind when he entered the bedroom, and to then lose control and react with extreme and excessive rage and violence without being able to curb his response or understand its excessiveness or the unlawfulness of his conduct (R2166:106-113).[33]

Caine and Wilson agreed between themselves to play the "Meet Lacey Lawrence" recording for the jury (R. 1377: 7). They also agreed to exclude the "Meet Lacey Lawrence" recording from the record that would be the foundation of Ott's

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[33]Trial lawyers are duty bound to make reasonable investigations into the facts and the law, and cannot make valid strategic decisions absent reasonably necessary and thorough investigation of the facts and the law. See Strickland v. Washington, 466 U.S. at 690.

appeal of right (R. 1377: 7).[14] This course of action dis-served Ott's interests and instead served those of the prosecutor, trial counsel's dear friend and employer. It is perhaps the clearest example of adverse effect of the conflict. See Wood and Mickens, *supra*. The foregoing Sixth Amendment violations would require reversal regardless of the Court's reconsideration of Booth.

2. The Inadmissibility of the Victim Impact Evidence under Utah Law Would Merit Relief Regardless of the Court's Reconsideration of Booth.

Were this Court to overturn Booth or the Utah Supreme Court's application of Booth in Ott's case, the substantial likelihood is that the Utah Supreme Court would nonetheless order Ott's sentence reversed because the victim opinion testimony and other victim impact evidence violated Utah law and the Fourteenth Amendment and trial counsel were constitutionally ineffective in failing to file a motion in limine or otherwise oppose its admission.

The Utah statute governing all capital sentencing procedures, including both those wherein death or life without parole was the maximum potential penalty, did not permit the admission of victim opinions such as caused Ott's sentence to be reversed. Rather, the statute indicated that evidence could be admitted concerning

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[14]Trial lawyers in capital cases have the obligation to protect the record so that it is fully available for review of the state and federal appellate courts. See ABA Guideline 10.7(B)(2) and 10.8(B)(2) (requiring capital lawyers to insure that the record is complete and supplement it when necessary); Strickland, *supra* (requiring courts to assess prejudice on the basis of the entire evidentiary picture). A complete record is essential to effectuating Ott's rights to judicial review, for if the record is incomplete, the courts may disregard issues, regardless of their merit. See, e.g., Horton v. Green Mut., 794 P.2d 847, 849 (Utah App. 1990).

"the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims[.]" Utah Code Ann. § 76-3-207 (2)(a)(ii). Under Utah law, the fact that the statute specified the types of victim impact evidence which were admissible implies that the legislature intended to exclude the types not mentioned, such as victims' family members' opinions of the defendants, their crimes and the appropriate sentences.[35]

Assuming that the victim opinion testimony did not violate the Utah statute, as tacitly indicated in the concurring opinion of Chief Justice Durham, the evidence and statute itself would be subject to a strong state constitutional challenge. See Pet. App. at 32-33 (concurring opinion of Chief Justice Durham, joined by Justice Parrish). The Utah Supreme Court has independently recognized the dangers posed by victim impact evidence, and has suggested that the admission of such evidence might be found to violate the Utah Constitution.[36] In Ott's case, the Utah Supreme Court reserved this question. See Pet. App. at 14 n.3. In the event

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[35] See, e.g. Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another); Hansen v. Wilkinson, 658 P.2d 1216, 1217 (Utah 1983) ("It probably is not wholly inaccurate to suppose that ordinarily when people say one thing they do not mean something else.") (quoting 2a C. Sands, *Sutherland Statutory Construction*, § 47.01 (4th ed. 1973)).

[36] See State v. Carter, 888 P.2d 629, 650-53 and accompanying notes (Utah), cert. denied, 516 U.S. 858 (1995). Cf. State v. Kell, 2002 UT 106, at ¶ 53 n.17, 61 P.3d 1019 (finding the admission of victim impact evidence harmless but citing with approval State v. Muhammad, 678 A.2d 164 (N.J. 1996), which carefully circumscribes the admission of this evidence so that unduly prejudicial victim impact evidence is not admitted).

3. The Inadmissibility of Victim Impact Evidence under the Fourteenth Amendment Would Merit Relief Regardless of the Court's Reconsideration of Booth.

In the event this Court overruled Booth or found it inapplicable to Ott's case, the Fourteenth Amendment would be another basis upon which the Utah Supreme Court might well rely in reversing Ott's sentence for ineffective assistance of counsel. In Payne, the Court recognized that if victim impact evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 501 U.S. 808, 825 (1991). The Fourteenth Amendment law to this effect is not limited in application to death penalty cases. E.g., Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

In Ott's case, with the assent of trial counsel, the State played "Meet Lacey Lawrence" for the jury. This is a powerfully moving six minute movie of Lacey and her loved ones sharing the milestones in Lacey's life. It begins with her as a baby being held, fed and bathed by her family members, crawling, rolling over, and walking. It shows her as a small child attending parties, celebrating Christmas, singing "Happy Birthday," blowing out candles, eating birthday cake, smiling, playing, riding a horse with her father, and dancing. It also depicts what appears to be her artwork, including her drawing of a little girl in bed, and her writing of, "I love you Mommy" amidst raindrops or teardrops. It ends with the dates of her birth and death, showing that she died two weeks before her seventh birthday (R1376:172). It is set to "You'll Always Be a Part of Me," sung by Billy Joel and "It's

a Wonderful World," sung by Louis Armstrong.

The State came very close to conceding that the "Meet Lacey Lawrence" video violated the Fourteenth Amendment. State's memorandum opposing 23B remand at 26-29; State's brief at 61-62. At oral argument, counsel for the State conceded that under Payne, the "Meet Lacey Lawrence" recording probably caused the most concern, and that the musical accompaniment to the recording may have been so unduly prejudicial as to have rendered the trial fundamentally unfair under the Due Process Clause, although counsel for the State did not think it did.[38]

The "Meet Lacey Lawrence" presentation violated the Due Process Clause of the Fourteenth Amendment. See Payne. As Justice Stevens aptly observed in his opinion respecting the Court's denial of certiorari in Kelly v. California, 129 S.Ct. 564 (2008), a case involving the presentation of similar recordings,

> Victim impact evidence is powerful in any form. But in each of these cases, the evidence was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.
>
> Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the

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[38]May 2008 oral arguments found at http://www.utcourts.gov/courts/sup/streams/ at approximately at minutes 31 through 37.

> victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.

Id. at 567 (footnote omitted).

The recording and much of the testimony of Lacey's family members were undoubtedly greatly distressing for the jurors to experience, and most probably left them feeling obligated to somehow compensate these people with the only thing the jurors were in a position to give -- a sentence of life in prison without parole. Particularly because Ott had no idea Lacey was present when he set the fire, his sentence should not turn on her family members' opinions of him and his crimes, and their desires as to his sentence. Because the victim impact evidence in this case undermined the fairness of Ott's sentencing proceeding,[39] the Fourteenth Amendment would be an additional alternative basis upon which this Court might rely in affirming the Utah Supreme Court's judgment.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted this 12th day of January, 2011.

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[39]The State and the Amicus are not challenging the Ott court's assessment of prejudice from the testimony that caused the reversal.